***United States Court of Appeals***

***for the Second Circuit***


# APPELLANT'S BRIEF

75-6011

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 75-6011

UNITED STATES OF AMERICA,

Plaintiff-Appellant

v.

HEALTHCO, INC.,

Defendant-Appellee

ON CROSS-APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

# BRIEF FOR THE UNITED STATES OF AMERICA

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# BRIEF FOR THE UNITED STATES OF AMERICA

## ISSUES PRESENTED

The dental products market in the New York Metropolitan area includes at least two relevant submarkets: dental equipment and dental sundries. In this civil antitrust action, the government challenged four acquisitions of full line New York dental dealers by a competitor, Healthco, Inc., on the ground that these acquisitions violated Section 7 of the Clayton Act. The district court sustained the government's product and geographic market definitions; held that the government had proved that the acquisitions may substantially lessen competition in the equipment submarket, but not in the sundries submarket; made no findings as to the broad dental products line; and decreed that Healthco should divest itself of assets sufficient to create one "dental equipment" firm in place of the four full line firms it acquired. The issues presented are:

1. Whether the relief decreed to remedy the violation in the dental equipment submarket should have required Healthco to reestablish four independent full line dental dealers.

2. If, on the violation found, relief was properly confined to the dental equipment submarket, whether the government established a violation in the sundries submarket or in the broad dental products market which entitles it to divestiture of four full line dental dealers.

## OPINION BELOW

The opinion of the district court (Inzer B. Wyatt, J.) was filed on January 14, 1975 and is reported at 387 F.Supp. 258.

## STATEMENT

This is an appeal pursuant to Section 5 of the Antitrust Procedures and Penalties Act (Pub. L. 93-528, 88 Stat. 1709) from a final judgment entered after a trial to the court in this civil antitrust action brought by the United States.

In a complaint filed April 2, 1970, the United States alleged that Healthco, formerly known as the Healthcare Corporation, violated Section 7 of the Clayton Act, 15 U.S.C. 18, by acquiring four full line dental dealers in the New York area in 1969. The government alleged that the effect of these four acquisitions, considered separately and cumulatively, may be substantially to lessen competition or tend to create a monopoly in the sale of dental products in the Metropolitan New York market.

I. The Dental Products Industry

A. The Product Market

There are four types of dental products: dental equipment, dental sundries, artificial teeth and precious metals (DC 4; T 36). 1/

1/ The following abbreviations are used in this brief to refer to portions of the record: trial transcript - T; Plaintiff's Exhibit - PX; Defendant's Exhibit - DX; Judgment - J; Transcript of April 1 hearing - TAA; Transcript of April 3 hearing - TAB; District Court's Final Opinion - DC, District Court's two Opinions of December 18, 1973 - Pl. Ev. or D. Ev.

Equipment consists of durable devices such as dental chairs, dental units X-ray machines, and darkroom supplies (DC 4; T 38-39, 149). Sundries consist of nondurable consumable products such as waxes, fillings, and cups (DC 4; T 39). The district court found that equipment and sundries are recognized submarkets of the dental products market (DC 16-17). All four classes of dental products are widely recognized within the industry and used by government agencies including the Census Bureau to gather various types of data (DC 4; GX 3, 4).

B. Structure of the Dental Products Industry

Most dental products are sold by dental dealers (DC 5). Dental dealers function as wholesalers and sell dental products primarily to dentists and also to dental laboratories, institutions such as hospitals and dental schools, and government agencies (DC 5; T 36, 150). Dental dealers solicit most of their business by means of salesmen who frequently visit dentists and other buyers of dental products (DC 6; PX 46 p. 28-30; T 71, 101). 2/ Salesman attempt to establish and maintain a list of regular customers with whom they develop a personal relationship (T 71, 101, 108). Salesmen help keep dentists informed about new products and innovations in the dental industry (DC 6).

There are two kinds of dental dealers; full line dealers and non-full line dealers (DC 5; T 53-59, 202-203). A full line dental dealer sells all four types of dental products (DC 5; T 36, 148, 202). In addition, full line dealers install and service the equipment they sell (DC 5; T 53-54, 202-203), employ specialists who help dentists plan the layout of their offices, and offer management advice (DC 6; T 72).

2/ Many dental dealers accept orders by telephone and several also sell some items over the counter. Telephone sales are handled by trained salesmen.

Most full line dental dealers maintain showrooms in which they display equipment to prospective purchasers (T 38). Historically, most, if not all, new dentists have consulted a dental dealer prior to establishing their own practice (DC 6; T 82, 165-166).

Non-full line dental dealers are usually dealers who do not sell, install or service equipment (DC 5; T 202-203). Rather, these dealers specialize in the sale of a broad line of sundries (ibid.). It is possible for a dental dealer to be financially viable without selling equipment because large quantities of sundries are used by customers and thus can be sold by non-full line dealers (T 53, 135, 781-783). In contrast, even assuming equipment sales provide a higher per item profit, the frequency of such sales is low in comparison to sundries sales thus making it difficult for a dental dealer to survive by selling equipment exclusively (DC 5-6; T 223). In fact, the district court concluded that "[e]ntry to the equipment submarket by a dental dealer selling equipment only is not economically feasible" (DC 34). Therefore, because of the importance of sundries to the financial health of a dental dealer, sundries are referred to by dental dealers as "our bread and butter items" (T 53).

Dental products are also sold by mail order houses. Mail order houses solicit sales through advertising and catalogues, not by means of salesmen (DC 7). They deal almost exclusively in sundries and provide none of the specialized services offered by a full line dental dealer (DC 7-8; T 708). Mail order houses generally operate out of a warehouse where they maintain a large inventory of sundries (DC 7). Most orders are received by mail but some are also received by telephone (DC 7; T 693). Mail order houses purchase the merchandise they sell both from dental products manufacturers and from dental dealers such as Healthco (DC 8; T 775).

Mail order houses are a comparatively new phenomena in the dental products industry (DC 22-24; T 106). While they may become increasingly important as a competitive force in the market, their current sales activity is still almost exclusively confined to dental sundries (DC 8; T 708). Moreover, mail order houses apparently make most of their sales in less urbanized areas where dental dealers do not normally operate (T 236-237).

Finally, some dental products manufacturers make direct sales to some customers such as dental schools and laboratories (DC 8). These direct sales usually involve only "certain specialized products" (DC 25). Moreover, even these sales are generally made with the assistance of a dental dealer (DC 25). The manufacturers depend upon dental dealers because they realize that they need dental dealers to distribute their products (DC 25). Like mail order houses, they provide few, if any, of the specialized services offered by dental dealers (DC 9).

Manufacturers sell most of their products to dental dealers and mail order houses (DC 24). Many manufacturers attempt to reduce competition between dealers selling their products by carefully limiting the number of dental dealers to which they will sell their products in any given geographic area (DC 8; T 94, 173, 212). Thus, it is difficult for dealers to obtain product lines from manufacturers, especially for new dental dealers seeking to sell equipment (ibid.).

II. The Acquiring Company

A. Healthco and Its Initial Entry Into The New York Market

Healthco is a Delaware corporation which was incorporated on January 2, 1968 under the name of the North American Nursing Homes, Inc. (DC 10). Its original business was the operation of patient care facilities (DC 10). However, since January 1, 1969, Healthco has acquired 30 dental dealers in 28 states and the District of Columbia with total 1969 sales of 42.8 million dollars (DC 10; GX 2).

Healthco originally entered the Metropolitan New York market in early 1969 by purchasing the assets of three former S.S. White dental product outlets located in the Bronx, Brooklyn and Manhattan (DC 9; GX 8). S.S. White is one of the nation's largest manufacturers of dental products (ibid.). It also owned a chain of dental product outlets. Pursuant to the provisions of an antitrust consent decree, White was compelled to offer its three New York outlets for sale (DC 9).

At approximately the same time that Healthco purchased the S.S. White outlets, it also purchased the assets of the National Dental Supply Company of New York, a partnership which had been selling dental sundries in Metropolitan New York (DC 9; GX 9). 3/ Following its acquisition of the S.S. White outlets and National, and based on their 1968 sales, Healthco ranked number 5 among dental dealers in sales of all dental products in the Metropolitan New York market with 6.5 percent of the market, number 7 in sales of dental sundries with 4.8 percent and number 12 in sales of dental equipment with 3.8 percent (GX 32, 35, 38). The government has not challenged the legality of these acquisitions.

B. Healthco's Subsequent Acquisitions

Shortly after acquiring White and National, Healthco purchased the four corporations involved in this case (DC 2):

| | |
|---|---|
| May 9, 1969 | General Dental Supply Co., Inc. ("General") |
| June 20, 1969 | M.A. Sechter Dental Equipment Co., Inc. ("Sechter") |
| November 15, 1969 | Hebard-Metro Dental Company, Inc. ("Hebard-Metro") |
| November 15, 1969 | Hebard Dental Supply Company, Inc. ("Hebard") |

3/ As correctly noted by the district court (DC 9), the three White outlets and National were actually purchased by the Rower Dental Supply Co. (T 534, 539, 545-546). However, Rower was acquired by Healthco [Continued]

As a result of its acquisition of General, Healthco became the first ranked company in the sale of dental products, equipment and sundries in the Metropolitan New York market. 4/ At the time of its acquisition, General ranked number 2 among dental dealers in the sale of dental products in Metropolitan New York with 8.2 percent of the market, number 5 in sales of sundries with 5.1 percent and number 1 in sales of equipment with 13.2 percent (GX 32, 35, 38). 5/

Each of Healthco's three subsequent purchases strengthened its position as the dominant dental dealer in Metropolitan New York. At the time of its acquisition, Sechter ranked sixth in the sale of dental products with 5.6 percent of the market, fourth in the sale of sundries with 5.6 percent, and sixth in the sale of equipment with 6.9 percent; Hebard-Metro ranked seventh in the sale of dental products with 5.6 percent, seventh in the sale of sundries with 4.8 percent, and third in the sale of equipment with 8.6 percent; Hebard ranked twelfth in the sale of dental products with 3.6 percent, eleventh in the sale of sundries with 3.3 percent and eighth in the sale of equipment with 4.8 percent (ibid.). As the following chart demonstrates, the net effect of these four acquisitions was to dramatically increase Healthco's share of the dental products market and the equipment and sundries submarkets (ibid.): 6/

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at approximately the same time that Rower made these acquisitions (T 540). Therefore, to avoid confusion, Rower is referred to as Healthco in this brief.

4/ This can be determined by adding the 1968 sales statistics of White, National and General.

5/ Government's exhibit 38 (GX 38), which lists the 1968 sales of dental equipment by dental dealers, does not include the 1968 equipment sales of the Rubenstein Dental Equipment Corp. The government informed the district court of this omission and provided the district court with the corrected 1968 equipment statistics used in this brief and in the briefs and proposed findings of fact submitted to the district court.

6/ These percentages are based on 1968 sales figures.

| | Pre-Acquisitions Market Share | Post-Acquisitions Market Share | Net Increase |
|---|---|---|---|
| Products | 6.5% | 29.6% | 23.1% |
| Sundries | 4.8% | 23.6% | 18.8% |
| Equipment | 3.8% | 37.2% | 33.4% |

Following these four acquisitions, Healthco's sales of all dental products were 3 1/2 times those of the number 2 dealer. Its sales of sundries were 2 1/2 times those of the number 2 dealer 7/ while its sales of equipment were 4 times those of the number 2 dealer (ibid.). Moreover, as illustrated by the following chart, Healthco's four acquisitions also significantly increased the level of concentration in the dental products market and in the submarkets for sundries and equipment (GX 43): 8/

MARKET SHARE

| | DENTAL PRODUCTS | | | DENTAL EQUIPMENT | | | DENTAL SUNDRIES | | |
|---|---|---|---|---|---|---|---|---|---|
| | 1968 | 1969 | 1970 | 1968 | 1969 | 1970 | 1968 | 1969 | 1970 |
| Top 4 companies | 30.0 | 50.4 | 49.3 | 38.5 | 60.3 | 64.7 | 27.5 | 45.1 | 43.2 |
| Top 8 companies | 51.2 | 67.2 | 64.5 | 63.3 | 80.7 | 82.3 | 45.7 | 60.6 | 58.2 |
| Top 10 companies | 58.8 | 72.8 | 69.3 | 72.3 | 86.6 | 87.5 | 52.6 | 65.6 | 63.1 |
| Leader | 8.3 | 29.9* | 30.3* | 13.2 | 36.7* | 38.5* | 9.1 | 25.2* | 25.4* |

7/ By the end of 1969, Healthco's sales were approximately three times those of the number 2 dealer in the sundries submarket (DC 35).

8/ Healthco is marked with an asterisk.

Pursuant to a stipulation entered by the parties prior to trial and continued by order of the district court pending this appeal, Healthco operates three of the acquired companies, Sechter, Hebard-Metro and Hebard, as separate, viable enterprises at separate locations (DC 3). The fourth acquired firm, General, was excluded from the stipulation and the subsequent order of the court because its separate outlet was closed by Healthco almost immediately after its acquisition.

III. Proceedings in the District Court

A. The Evidence Presented at Trial

The government's case in chief consisted of the testimony of four dental dealers who described their business operations, an economist who had prepared the government's statistical survey and an economist who testified concerning the definition of the relevant product and geographic market. The dental dealers' testimony emphasized the importance of salesmen to a full line operation and testified that full line dealers are the most important competitors in the market because only they provide complete service to the dental profession (T 53-54, 71, 101, 153-155, 201-204, 223). One dealer testified that mail order houses sell most of their products in rural areas where they do not have to compete against full line dental dealers (T 236-237). Finally, these dealers emphasized the importance of sundries sales to the financial viability of a dealer and testified that only two dealers had ever even attempted selling equipment exclusively (T 115-116, 135, 223).

The methodology employed in gathering the government's statistical evidence is described in the district court's opinion of December 18, 1973 (Pl. Ev. 1-8). Briefly stated, the government mailed survey forms to dental dealers, mail order houses and manufacturers in order to measure the market of sellers of dental products in Metropolitan New York. The names of the companies contacted were compiled from trade association manuals, interviews with dental dealers within the Metropolitan New York area and from Healthco's answers to interrogatories submitted by the government (Pl. Ev. 4; DC 19). The survey determined not only the volume of sales being made by the companies contacted but also where those sales were made. 9/

Healthco called five witnesses in an attempt to show that the government's survey was inaccurate because it did not include all of the business entities which were selling dental products in the Metropolitan New York market. Its expert witnesses, an economist and a statistician employed by the American Dental Trade Association, relied primarily upon data published by the Census Bureau and upon statistics contained in trade reports and surveys. However, they played no role in gathering the data contained in these sources (DC 27; T 603; D. Ev. 3).

B. The District Court's Opinion of January 14, 1975

The district court accepted the government's definition of the relevant line of commerce, the product market, and the relevant section of the country, the geographic market (DC 16-17, 31). 10/

9/ The government also called a Census Bureau official to testify as a rebuttal witness. He testified that census data could not be used to reliably measure the market in this case. (T 785-824).

10/ The geographic market was defined as follows: the city of New York; the counties of Nassau, Rockland, Suffolk and Westchester in New York state; the counties of Bergen, Essex, Hudson, Middlesex, Morris, Passaic, Sommerset and Union in New Jersey (DC 9). This area is referred to as Metropolitan New York.

Sundries and equipment were recognized as valid submarkets (DC 16). The district court held that the government's survey techniques were valid, that the government had contacted all dealers of any significance in Metropolitan New York, and that "sales of mail order houses which were missed by the survey would have slight meaning in the sundries submarket and no meaning in the equipment submarket" (DC 13). It found that the government's statistical exhibits presented "a reasonably accurate picture of the competition in the two submarkets . . ." (DC 18).

The district court rejected Healthco's statistical evidence as inaccurate and speculative (DC 27-28). It found that mail order houses would have a negligible effect on the equipment submarket and that manufacturers are not a significant factor because they do not make direct sales to dentists (DC 24-26). Finally, the court stated that even assuming that the government had not contacted all of the mail order houses selling sundries in Metropolitan New York, any omissions "would not detract from the reasonable accuracy of the government's statistical exhibits" (DC 28).

Turning to the effects of the mergers, the district court concluded that in the dental equipment submarket, concentration among the top four, top eight and top ten competitors was heavy and that, in light of the economic barriers to entry, the statistical evidence presented by the government demonstrated that the mergers will have "the effect of substantially lessening competition . . ." (DC 34). In the sundries submarket, however, the court, despite its earlier statements concerning the validity of the government's evidence, concluded that the government's evidence showing Healthco's shares of the dental sundries market in 1969 and 1970 was speculative because of "omissions" - apparently of mail order houses. The court viewed this submarket as

showing no significant concentration of sellers. It also found evidence of a shift from full line to sundries dealerships and that there were comparatively low entry barriers into this submarket. It therefore concluded that there had been no violation of Section 7 in the sundries submarket (DC 36).

The district court stated that it saw no need to consider or make separate findings as to the broad dental products line (DC 36). Finally, the court found that its decision was not inconsistent with United States v. General Dynamics Corp., 415 U.S. 486 (1974).

C. Post Trial Proceedings

On April 1, 1975, the district court conducted a preliminary hearing on the issue of relief at which it reviewed a proposed judgment submitted by the government which would have required Healthco to completely divest itself of all four acquired companies. The court criticized the government for not submitting a judgment sooner, pending Department of Justice clearance; it then invited counsel for Healthco to submit their own decree. Thereafter, at a hearing on April 3, 1975, Healthco argued that it should not be required to divest itself of any of its acquisitions on the ground that conditions in the market had changed. Healthco presented several affidavits which purported to show that new competition had recently entered the market. The court appeared to give no weight to this submission (TAB 7) and the government was not given any opportunity to present opposing affidavits or witnesses. Moreover, the government had no opportunity to examine Healthco's affidavits prior to the hearing.

Healthco also submitted its own proposed final judgment. Simply stated, the judgment provided that Healthco would transfer certain physical assets including one building and the equipment and repair facilities in that building to a new "Dental Equipment Corporation." In addition, Healthco's proposed judgment provided that it would transfer to the new corporation eight dental equipment specialists, the customer lists used by those specialists and the right to sell and distribute equipment manufactured by thirteen listed dental equipment manufacturers. Finally, the proposed judgment required Healthco to divest this new corporation within one year, prohibited. Healthco from reacquiring it, enjoined Healthco from acquiring any interest in any dental equipment dealership in Metropolitan New York for five years, and ordered Healthco to refrain from soliciting equipment sales involving equipment manufactured by the thirteen listed manufacturers from dentists on the dental equipment specialists customer lists for a period of two years. The proposed judgment did not contain any provision for government approval or court approval of the purchaser of the company which is to be divested.

The government did not see a copy of the defendant's proposed judgment until the commencement of the April 3 hearing. After a hasty reading in the courtroom, the government objected to the proposed judgment on the ground that it was entitled to the complete divestiture of all four acquired companies into the four competing full line dealers they were prior to their illegal acquisition. Moreover, the government argued that the company which Healthco proposed to establish would not be able to effectively compete because it would not be a full line dealership (TAB 10).

The district court, after a brief argument, signed Healthco's proposed judgment over the government's strong objections (TAB 25). The court stated that it would give Healthco twelve months in which to divest itself of the new corporation and that if it failed, the court would enter a judgment substantially similar to the one originally proposed by the government (TAB 26).

Introduction and Summary of Argument

1. Under Section 7 of the Clayton Act, a horizontal merger is prima facie unlawful if it produces a firm controlling an undue percentage share of the market and significantly increases market concentration. United States v. Philadelphia National Bank, 374 U.S. 321, 363 (1963); United States v. General Dynamics Corp., supra, 415 U.S. at 496-499; United States v. Citizens & Southern National Bank, 43 U.S.L.W. 4779 (U.S. June 17, 1975). While no specific percentage share is necessarily "undue," the Supreme Court has applied the principle of prima facie illegality in mergers involving combined shares as small as 4.5 percent and 7.5 percent. United States v. Pabst Brewing Co., 384 U.S. 546 (1966); United States v. Von's Grocery Co., 384 U.S. 270 (1966).

There can be little doubt that the government established a prima facie case of illegality in the equipment submarket. Healthco's overwhelmingly dominant position in that submarket as a result of the mergers, the high concentration in it even before Healthco's acquisitions and the high entry barriers around it all support the district court's conclusion that the mergers may substantially lessen competition in the equipment submarket. Moreover, as the district court found, Healthco failed to rebut the government's prima facie case in this submarket.

2. Having concluded that Healthco violated Section 7 in the equipment submarket, the district court erred in not ordering complete divestiture of all four acquired companies. Because of the importance of sundries to the financial viability of a dental dealership and the role of salesmen in establishing good will, the judgment entered by the district court creates a corporation which is not economically viable. Moreover, the relief ordered by the district court leaves the equipment submarket more highly concentrated than it was prior to Healthco's illegal acquisitions and does not "cure the ill effects of the illegal conduct, and assure the public freedom from its continuance." United States v. United States Gypsum Co., 340 U.S. 76, 88 (1950). See also United States v. Du Pont & Co., 366 U.S. 316 (1961); Ford Motor Co. v. United States, 405 U.S. 562 (1972).

3. Even assuming that the government is not entitled to complete divestiture of four full line dental dealers on the basis of the district court's finding that Healthco had violated Section 7 in the equipment submarket, complete divestiture is still the only appropriate remedy in this case because the district court erred in not finding a violation of Section 7 in the sundries submarket, and in not reaching the question of whether Healthco had violated Section 7 in the dental products market. In both the sundries submarket and the dental products market, the government presented sufficient evidence to establish a prima facie case of illegality. This evidence was not rebutted by Healthco. A finding of illegality in either the sundries submarket or the dental products market would necessarily require the complete divestiture of four full line dental dealers.

## ARGUMENT

### I. HEALTHCO'S ACQUISITION OF FOUR FULL LINE DENTAL DEALERS VIOLATED SECTION 7 IN THE EQUIPMENT SUBMARKET

#### A. Equipment is an Appropriate Line of Commerce and the Metropolitan New York Area is an Appropriate Section of the Country for Determining the Competitive Effects of the Acquisitions

A merger violates Section 7 of the Clayton Act if it has the proscribed anticompetitive effect "in any line of commerce." Within any broad market, "well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962). Equipment satisfied the "practical indicia" of an "economically significant submarket" as defined by the Supreme Court in Brown Shoe (id. at 325). Equipment is recognized by the industry and by various government agencies as a separate economic entity (DC 4, 16-17; GX 3, 4). It is physically different from the other distinct types of dental products and frequently sold by specialized equipment salesmen (DC 16-17). 11/

The record also supports the district court's definition of the relevant section of the country or geographic market. The survey conducted by the government required the responding companies to indicate the counties in which they made their sales (GX 26). The results of this survey clearly establish that the responding dental dealers made almost all of their sales within the geographic market

11/ While every case must be decided on the basis of its own record, the district court's analysis of the product market in this case plus its discussion of the barriers to entry and the characteristics of full line dental dealers is substantially identical to the findings of fact of another district court in a case involving a vertical merger in the dental products industry. See United States v. Sybron Corporation, 329 F.Supp. 919 (E.D. Pa. 1971) (discussed infra at p. 28 ).

defined by the court in competition with each other. 12/ Thus, the geographic market defined by the court corresponds "to the commercial realities of the industry" and is "economically significant." Brown Shoe Co. v. United States, 370 U.S. at 336-337. See also United States v. Pabst Brewing Co., supra, 384 U.S. at 549.

B. The Effect of Healthco's Acquisition May Be Substantially to Lessen Competition in the Relevant Market.

Section 7 of the Clayton Act was enacted to halt what Congress perceived to be a rising trend toward concentration in the American economy by preventing mergers which could produce anticompetitive changes in market structure, i.e., those which threatened to weaken the normal play of competitive market forces. Brown Shoe Company v. United States, supra, 370 U.S. at 315-316, 320-322. Its purpose was "preventative - to check anticompetitive acts in their incipiency before they reached the dimensions of Sherman Act violations." United States v. Bethlehem Steel Corporation, 168 F. Supp. 576, 582 (S.D. N.Y. 1958); see also Brown Shoe Company v. United States, supra, 370 U.S. at 317. Thus, in Section 7, "Congress used the words 'may be substantially to lessen competition' to indicate that its concern was with probabilities, not certainties." Brown Shoe Company v. United States, supra, 370 U.S. at 323 (emphasis in original). Moreover, even a cursory examination of the legislative history of Section 7 reveals a strong congressional desire to prevent "the formation of further oligopolies with their attendant adverse effects upon local control of industry and upon small business."

12/ As the Supreme Court emphasized in United States v. Pabst Brewing Co., supra, the phrase "in any section of the country" in Section 7 "does not call for the delineation of a 'section of the country' by metes and bounds as a surveyor would lay off a plot of ground" (384 U.S. at 549). See also United States v. Philadelphia National Bank, supra, 374 U.S. at 360, n. 37; United States v. Marine Bancorporation, 418 U.S. 602, 618-623 (1974).

Id. at 333. Therefore, one purpose of Section 7 is to prevent an industry composed of many independent units from becoming more concentrated by preventing mergers which could result in the lessening of competition through increased market concentration. Id. at 317-318, 333-334, see also S. Rep. No. 1775, 81st Cong., 2d Sess. 5 (1950); H.R. Rep. No. 1191, 81st Cong., 1st Sess. 8 (1949); United States v. Von's Grocery Co., supra, 384 U.S. at 275-278. Section 7 is but another means by which Congress, through the antitrust laws, promotes "internal growth as the normal and legitimate technique of business expansion . . . ." United States v. Citizens & Southern National Bank, supra, 43 U.S.L.W. at 4788.

The primary index of market power and, therefore, the primary means of predicting the competitive effect of a merger, are statistics which reflect "the shares of the market controlled by the industry leaders and the parties to the merger . . . ." Brown Shoe Company v. United States, supra, 370 U.S. at 322, n. 38. If the government's statistical evidence proves that a merger would produce a firm which controls an undue percentage share of the market and significantly increase market concentration, then the government has established prima facie that the effect of the merger may be substantially to lessen competition. United States v. General Dynamics Corp., supra, 415 U.S. at 494-498; United States v. Philadelphia National Bank, supra, 378 U.S. 441, 458 (1964). The Supreme Court has never specified the minimum combined share which would establish prima facie illegality. However, in Philadelphia

Bank, the merging banks' combined share of more than 30 percent of the relevant market was prima facie illegal. Considerably smaller combined shares were found to establish prima facie illegality in United States v. Von's Grocery Co., supra (7.5%), and United States v. Pabst Brewing Co., supra (4.5% of the national market, 11% of a three state market and 24% of a single state market). In both Von's Grocery and Pabst, the relevant markets had experienced a rapid increase in concentration. The Court noted that "a trend toward concentration in an industry, whatever its causes, is a highly relevant factor in deciding how substantial the anticompetitive effect of a merger may be." United States v. Pabst Brewing Co., supra, 384 U.S. at 552-553. See also United States v. Von's Grocery Co., supra, 384 U.S. at 377.

There can be little doubt that under the criteria established in Philadelphia Bank and reaffirmed in General Dynamics, the government established a prima facie case of illegality in the equipment submarket. That submarket was already highly concentrated even prior to Healthco's acquisition of the first, third, sixth and eighth ranked competitors in it (GX 38, 43). 13/ Moreover, the district court noted that the number of companies selling dental equipment had been declining even prior to Healthco's acquisitions (DC 34). 14/ Thus, the effect of Healthco's acquisition of four of its competitors will be to substantially increase market concentration in an already concentrated market and to further reduce the number of sellers in

13/ Immediately prior to the acquisitions at issue, the top four companies in the equipment submarket controlled 38.5% of that submarket, the top eight 63.3% and the top ten 72.3% (GX 43). After the mergers, the top 4 controlled 60.3%, the top eight 80.7% and the top ten 86.6% (id.).

14/ Henry Walter, the president of a full line dental dealership, testified that a number of major competitors have left the market

[Continued]

an already declining market. 15/ Moreover, Healthco's post acquisition market share makes it the dominant seller in the equipment submarket, with sales approximately four times greater than the number 2 ranked company. 16/ Finally, its status as a large nationwide dealer gives it a significant competitive advantage (DC 34).

The government's statistical case is strengthened by the fact that the district court held that there are significant economic barriers to entry into the equipment submarket. 17/ These entry barriers result from the fact that manufacturers limit the number of dealers which can sell their equipment (DC 8, 33-34; T 94, 173, 212). Moreover, the sale and servicing of equipment requires trained specialists and experienced management (DC 34). For these reasons, and because entry requires capital in excess of $100,000, the district court concluded that "[e]ntry to the equipment submarket by a dental dealer selling equipment only is not economically feasible" (DC 34).

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since 1968 (T 90-93). Moreover, he testified that no new companies have entered the market since that time (T 93).

15/ Actually, the full anticompetitive impact of Healthco's illegal acquisitions has not yet been fully realized. Because of the hold separate order currently in effect, Healthco is required to operate three of its four acquired dealers as separate, viable enterprises at separate locations.

16/ Healthco's share of the equipment submarket, using 1968 sales figures, rose from 3.8% to 37.2% as a result of the merger (see table on p. 8, supra). Immediately after the mergers, the number 2 company in this submarket possessed 8.9% of it (GX 38). Thus, the top two companies combined controlled 46.1% of the submarket immediately after the mergers.

17/ Some of these entry barriers are discussed in Henry Walter's testimony (T 94-96, 131).

In fact, there has been no significant entry into the equipment submarket since 1968 by either a full line or a non-full line dealer and the number of existing sellers in it continues to decline (DC 34).

Healthco has argued that the government's statistical evidence is inaccurate because the survey upon which this evidence was based did not include all of the sellers of dental equipment in the market. However, as noted above, the government contacted every dental dealer doing business in the market who belonged to the two trade associations in this industry; all companies, including mail order houses which Healthco claimed were its competitors in its response to the government's interrogatories; and any company identified as a competitor in this market during the government's interviews with various dental dealers (DC 12-13, 19). 18/ Thus, the methodology employed in taking the government's survey virtually insured that all but the most insignificant sellers of dental equipment would be included in the survey.

Moreover, the statistical evidence introduced by Healthco in an attempt to prove that the government's survey underestimated the market was, as found by the district court (DC 26-28), unreliable. Many of the defects in Healthco's statistical evidence are discussed in the district court's opinion of December 18, 1973 (D. Ev. 3-6) and in its final opinion (DC 26-28). Briefly stated, Healthco never presented any witnesses who could testify as to the reliability of

18/ The government also made a special survey of dental products manufacturers.

the methodology employed in gathering its statistical data. 19/ Moreover, none of its data specifically related to the Metropolitan New York area. Finally, the calculations made by Healthco's experts on the basis of this data are themselves open to serious question. 20/ Thus, the district court's conclusions concerning the accuracy of Healthco's statistical evidence are fully supported by the record.

While market share statistics are the primary index of market power, they are not necessarily conclusive. United States v. General Dynamics, supra, 415 U.S. at 497-504. Thus, a defendant in a Section 7 case can rebut the government's prima facie case by establishing" that the market share statistics gave an inaccurate account of the acquisitions' probable effects on competition." United States v. Citizens& Southern National Bank, supra, 43 U.S.L.W. at 4789. In this case, however, Healthco has failed to rebut the government's prima facie case. While Healthco has speculated that mail order houses and manufacturers are a significant and growing competitive force in the equipment submarket, the district court found, after carefully examining the evidence, that mail order houses deal almost exclusively in sundries (DC 7-8, 22-24) while manufacturers rely almost entirely upon dental dealers and mail order houses to resell their products (DC 24-26). Thus, neither mail order houses nor manufacturers

19/ For example, Defendant's Exhibit U (DX U), the 1968 ADA Survey of Dental Practice, contains the results of a survey of dentists in which three out of four dentists contacted failed to respond. There is nothing in the publication to indicate that those who did respond reflected a representative sample of all dentists.

20/ For example, the accuracy of the calculations made by Healthco's statistician, David Ellis, depend in part upon the accuracy of his estimate of the total number of active, nonsalaried dentists in the Metropolitan New York area. He assumed for purposes of his calculations that all active dentists are nonsalaried in spite of the fact that DX U indicates that as many as 20% of all active dentists may be salaried.

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can or do effectively compete with full line dental dealers in the equipment submarket.

In addition, dental dealers possess a significant competitive advantage over mail order houses and manufacturers because their salesmen visit actual and potential customers at frequent intervals thus establishing close customer relationships and good will (DC 6; T 71, 101, 165, 223-225, 577; PX 46 p. 29). 21/ Finally, Healthco has produced no credible evidence which contradicts the district court's finding that the number of sellers of dental equipment has been declining and that, because of high entry barriers, there has been no significant entry since 1968 into the equipment submarket (DC 34; T 90-93). Therefore, Healthco did not rebut the government's prima facie case in the equipment submarket and the district court's finding of liability in this submarket must be affirmed.

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The testimony of Healthco's other expert witness, economist Dr. Gould, is even more suspect because his calculations are based upon census data which, according to the Census Bureau official who testified as a rebuttal witness for the government, could not be used to accurately measure the market involved in this case.

21/ Dundas Flaherty, the vice president of a company engaged primarily in the sale of orthodontic supplies, testified at his deposition that "[t]he outstanding disability we suffer in competing with dealers is that we cannot afford the same intensive degree of personal selling that the dealer realizes to maintain his business" (DXM 16). This "disability" has impeded his company's ability to expand its operations in the Metropolitan New York market (DXM 16).

The importance of salesmen can also be illustrated by the fact that Marvin Cyker, President of Healthco, described the four acquisitions in question in terms of the number of salesmen he obtained as a result of each acquisition (T 548, 552, 558-559, 564, 577-578). Cyker also agreed that "having good salesmen calling on dentists is an advantage to the dental dealer and a considerable advantage over a mail order house" (T 577).

II. THE DISTRICT COURT ERRED IN NOT ORDERING HEALTHCO TO DIVEST ITSELF COMPLETELY OF ALL FOUR ACQUIRED COMPANIES IN ORDER TO REESTABLISH FOUR INDEPENDENT FULL LINE DENTAL DEALERS.

A. Only Complete Divestiture will Restore Competition in the Equipment Submarket

As noted above, the purpose of Section 7 is to prevent mergers which could result in the lessening of competition. If the government proves that a merger is prohibited by Section 7, then the express language of that statute suggests "that an undoing of the acquisition is a natural remedy." United States v. Du Pont & Co., supra, 366 U.S. at 329. Moreover, "once the Government has successfully borne the considerable burden of establishing a violation of law, all doubts as to the remedy are to be resolved in its favor." Id. at 334. Thus, divestiture has been the traditional remedy applied in Section 7 cases. In fact, the Supreme Court has stated that "[c]omplete divestiture is particularly appropriate where asset or stock acquisitions violate the antitrust laws." Ford Motor Co. v. United States, supra, 405 U.S. at 573. 22/

The judgment entered by a district court finding that a merger violated Section 7 must provide relief "effective to redress the violations" and "to restore competition." United States v. Du Pont & Co., supra, 366 U.S. at 316, 326; Ford Motor Co. v. United States, supra, 405 U.S. at 573. In order to achieve this result, the district

22/ Healthco, like most other defendants in Section 7 cases, was "on notice of antitrust charge from almost the beginning . . . ." United States v. El Paso Gas Co., 376 U.S. 651, 662 (1964). Complete divestiture, "without delay", is routinely ordered in such cases. Id.

court "is not limited to the restoration of the status quo ante . . . . [r]ather, the relief must be directed to that which is 'necessary and appropriate in the public interest to eliminate the effects of the acquisition offensive to the statute', United States v. Du Pont & Co., 353 U.S. 586, 607 . . . or which will 'cure the ill effects' of the illegal conduct, and assure the public freedom from its continuance. United States v. United States Gypsum Co., 340 U.S. 76, 88 . . . ." Ford Motor Co. v. United States, supra, 405 U.S. at 573, n. 8 (emphasis in original).

The judgment entered by the district court in this case is clearly inadequate under the standards announced in Du Pont and Ford Motor Co. Not only did the district court fail to resolve "all doubts as to the remedy" in favor of the government (Du Pont, supra, at 329) 23/ but it also entered a decree which falls far short of eliminating the effects of Healthco's illegal acquisitions. Healthco's acquisition of four full line dental dealers was found by the district court to be in violation of Section 7 in the equipment submarket. However, rather than restoring the four full line dealers that had previously ranked first, third, sixth and eighth in the equipment submarket, the judgment entered by the district court creates one new company selling only equipment from a single location where there had been four full line dealers competing with each other out of four different locations. Thus, the judgment does not

23/ Even a cursory examination of the transcripts of the April 1 and April 3 hearings indicates that the district court did not seriously consider the objections raised by the government to Healthco's proposed judgment in spite of the fact that these objections were based at least in part upon findings of fact which the district court had made in its opinion.

even restore the equipment submarket to the competitive situation that existed prior to Healthco's illegal acquisitions. Rather, it leaves that submarket even more heavily concentrated than it was prior to Healthco's illegal acquisitions by eliminating four full line dealers which had been ranked in the top ten in that submarket and replacing them with a single company selling exclusively equipment.

Moreover, the judgment fails to "cure the ill effects of" (United States v. United States Gypsum Co., supra, 340 U.S. at 88) Healthco's illegal acquisitions, because it permits Healthco to retain significant assets acquired as a result of the illegal acquisitions. The judgment requires Healthco to transfer to the new corporation a building located at 331 West 44th Street in New York and the repair and service facilities located within it (J 3). Aside from the fact that there is no evidence in the record which even suggests that any of the four acquired corporations ever operated out of that location prior to their acquisition by Healthco, the judgment permits Healthco to retain all of the other physical assets including buildings and service and repair facilities that had been previously used by the four illegally acquired corporations. 24/ In addition, the judgment does not even provide for the transfer of any equipment in inventory to the new corporation thus permitting Healthco to retain any inventories currently held by the acquired companies.

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24/ Under the terms of a stipulation entered into prior to the trial in this case and continued by order of the district court pending this appeal, Healthco is required to operate three of the four acquired corporations as separate, viable business out of separate locations (DC 3).

Simply because the district court found a violation of Section 7 only in the equipment submarket, that does not mean that relief must be confined to that submarket. As noted above, the remedial powers of a district court in a Section 7 case are broad. Ford Motor Co. v. United States, supra. Thus, in determing what relief is necessary to cure the violation found, the district court in a Section 7 case "is not limited to the restoration of the status quo ante" (id. at 573, n. 8) if broader relief is necessary "to eliminate the effects" (United States v. Du Pont & Co., supra, 353 U.S. at 607) of the illegal acquisition or to "cure the ill effects of the illegal conduct . . ." (United States v. United States Gypsum Co., supra, 340 U.S. at 88). Id. 573.

The broad power of a district court to grant relief in a Section 7 case is comparable to the power granted to the Federal Trade Commission under Section 11 of the Clayton Act, 15 U.S.C. 21, and under the similarly worded Section 5 of the Federal Trade Commission Act. 25/ Cases interpreting these sections hold that the Commission's remedial powers are not limited to correction of the specific violation found. See, e.g., Federal Trade Commission v. Henry Broch & Co., 368 U.S. 360, 363-364 (1962); Federal Trade Commission v. National Lead Co., 352 U.S. 419, 428-430 (1957); Federal Trade Commission v. Ruberoid Co., 343

25/ Section 11 of the Clayton Act provides that upon finding a violation, the Commission shall issue on order requiring the violator "to cease and desist from such violations, and divest itself of the stock . . . or assets, held . . . contrary to the provisions of Section 7 . . . of this Act . . . ."

U.S. 470, 473 (1952). Rather, within the limits of responsible discretion, its remedial authority may be exercised to forestall in their incipiency any threats of renewed conduct which is reasonably related to the violations found by the Commission. See, e.g., Atlantic Refining Co. v. Federal Trade Commission, 381 U.S. 357, 376 (1965); Federal Trade Commission v. Colgate-Palmolive Co., 380 U.S. 374, 394-395 (1965); Jacob Siegel Co. v. Federal Trade Commission, 327 U.S. 608, 612-613 (1946); Abex Corporation v. F.T.C., 420 F.2d 928 (6th Cir. 1970), certiorari denied, 400 U.S. 865 (1970).

Finally, in United States v. Sybron Corporation, 329 F. Supp. 919 (E.D. Pa. 1971), the government challenged the vertical merger of a dental products manufacturer with a chain of full line dental dealers. The district court, using the same product market definitions used in this case, found that the merger violated Section 7 in the equipment submarket but not in either the sundries submarket or the dental products market. However, even though it found a violation of Section 7 only in the equipment submarket, the district court entered a judgment providing for complete divestiture. United States v. Sybron Corp., CCH 1971 Trade Cases ¶ 73766 (E.D. Pa. 1971).

B. The Judgment Entered by the District Court Establishes a Non-Viable Corporation and Does not Provide Adequate Procedural Safeguards

Aside from the fact that the judgment entered by the district court is inadequate to restore competition in the equipment submarket, the judgment creates a corporation which appears to be economically unviable, because it deals only in equipment.

In its opinion, the district court noted that dealers who sell equipment but who do not also sell sundries are almost nonexistent (DC 6). In fact, the record indicates that only two dealers have ever even attempted to sell equipment exclusively and one of those converted to a full line dealership before it went out of business (T 115-116, 223). Moreover, the district court also found that "[e]ntry to the equipment submarket by a dental dealer selling equipment only is not economically feasible" (DC 34).

The difficulty with running an equipment only dental dealership is the absence of revenues derived from the sale of sundries. Sundries are considered the "bread and butter" (T 53) items sold by dental dealers because the high volume nature of sundries sales provides continuous revenue to the dealership. In contrast, equipment sales are less frequent. Moreover, the salesmen employed by dental dealers who visit dentists on a regular basis are primarily sundries salesmen (PX 46 p. 28-29; T 154). The relationship which the salesman develops with the dentist influences him to buy equipment from the salesman's dealership when the need arises (T 71). In fact, one of the functions of a salesman is to keep the dentist informed about new types of equipment (DC 6). In addition, equipment specialists generally work in a showroom where they can display

the equipment they are trying to sell (PX 46 p. 32; T 152). Therefore, through the sale of sundries, a full line dealer establishes the good will which generates equipment sales as well as additional revenue. The lack of sundries will seriously hamper the new equipment company created by the judgment in its efforts to compete with established full line dealers.

Moreover, the judgment does not provide the new company adequate protection from Healthco. Under the judgment, Healthco retains the right to solicit equipment sales from any dentist whose name does not appear on the customer lists transferred to the new corporation and from any dental lab, government agency or institution; the right to solicit equipment sales from any dentist including a dentist whose name appears on the customer lists given to the new corporation, so long as the equipment involved in the solicitation is not manufactured by one of the thirteen manufacturers listed in the judgment; and the right to have its regular salesmen make equipment sales to anyone.

Thus, while the judgment prohibits Healthco from soliciting equipment sales under certain circumstances from any dentist on the customer lists transferred to the new corporation, 26/ nothing in the judgment prohibits a Healthco sundries salesman from selling equipment to a dentist on these lists if he desires to make a purchase.

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26/ Actually, the no solicitation provision in the judgment is probably unenforceable. Healthco's salesmen are only prohibited from soliciting sales involving equipment manufactured by 13 listed companies (J 4-5). Thus, they can solicit equipment sales from any dentist so long as the solicitation does not involve equipment manufactured by the 13 listed companies. There are literally dozens of manufacturers of dental equipment.

In addition, the fact that Healthco and other full line dealers sell sundries gives them a competitive advantage over the new company in developing a business relationship with a new dentist just starting his practice because their salesmen will visit him more frequently and can offer him a complete line of all dental products. Therefore, based on the district court's own findings and evidence in the record, the judgment entered in this case has created a company with little likelihood of survival in the market because it will not be able to effectively compete against established dealerships. The creation of such a company does not satisfy the requirements of Du Pont and Ford Motor Co. In fact, in Ford Motor Co., the Supreme Court affirmed a judgment which imposed what would have otherwise been considered a number of anticompetitive restrictions on Ford, the acquiring company, because those restrictions were necessary to re-establish the divested company as an effective competitor in the market and to give other competitive forces already at work in the market time to alter the industry's oligopolistic structure. 27/

Finally, the judgment entered in this case is also deficient because it fails to contain the standard procedural safeguards placed in divestiture decrees in order to insure that a defendant properly disposes of its illegal acquisition. The judgment does not provide either for district court or government approval of the purchaser

27/ Ford Motor Co. involved the acquisition of an independent manufacturer of spark plugs and other automotive parts by the nation's second largest automobile manufacturer. After finding that this acquisition violated Section 7 of the Clayton Act, the district court entered a judgment which, among other things, temporarily eliminated Ford as a spark plug manufacturer and required it to purchase spark plugs from the divested company for five years, during which time it was prohibited from using its own trade names on spark plugs.

of the company created by the judgment. This could result in Healthco selling the new company to another large dental dealer, thus creating a new antitrust violation and, quite possibly, new litigation. This omission may have been a product of the district court's hasty consideration of Healthco's proposed judgment. Indeed, in recognition of this defect, the court, at a hearing on the government's motion to stay the judgment, stated that he would be willing to amend the judgment to provide for court and government approval of any purchaser.

## III. COMPLETE DIVESTITURE IS REQUIRED IN THIS CASE BECAUSE HEALTHCO ALSO VIOLATED SECTION 7 IN THE SUNDRIES SUBMARKET AND IN THE DENTAL PRODUCTS MARKET

Even assuming the relief ordered by the district court is adequate to restore competition to the equipment submarket, a fact which the government disputes, the court erred in not ordering complete divestiture because Healthco also violated Section 7 in the sundries submarket and in the dental products market. The only way in which competition will be restored to either the sundries submarket or the dental products market will be by requiring Healthco to completely divest itself of all four acquired companies. Ford Motor Co. v. United States, supra; United States v. Du Pont & Co., supra.

### A. The District Court Erred In Concluding That Healthco Did Not Violate Section 7 In The Sundries Submarket

1. The district court held that Healthco had not violated Section 7 in the sundries submarket. The court stated that the government's statistical evidence did not accurately reflect Healthco's share of the sundries submarket apparently because it

believed the government's survey did not include all mail order houses that may be doing business in Metropolitan New York (DC 35). However, this conclusion is inconsistent with other findings made by the court. During its discussion of the methodology employed in gathering the government's statistical evidence, the court stated (DC 13):

> No evidence was introduced by Healthco to show the volume of sales of dental products of those mail order houses not covered by the survey. It is doubted that any mail order houses not covered by the survey sold in any year dental products for more than $100,000. No competitor of any significance in the Area was missed by the survey. In any event, sales of mail order houses which were missed by the survey would have slight meaning in the sundries submarket and no meaning in the equipment submarket.

During discovery, Healthco was asked to list its competitors, (GX 25, 27, 29). The government contacted every company listed by Healthco as a competitor, including mail order houses, four of which were located outside of Metropolitan New York (DC 12-14, 19). The court described the surveyed mail order houses as follows (DC 23):

> These mail order houses, though considered competitors, never ranked higher in volume of sales than 20 on a list by sales volume of dental sellers. Only four mail order houses had sales in excess of $100,000; only these could be said to have any competitive impact in the dental products market. Three mail order houses had sales below $15,000 in each of the years surveyed; these could scarcely be considered significant competitors by any standard. 28/

28/ Of the four mail order houses located outside of New York but which Healthco claimed were doing business in Metropolitan New York, only one ranked higher than the bottom five companies in the dental products market out of the approximately sixty companies listed during the three years covered by the government's survey (GX 32, 33, 34).

Thus, even those mail order houses which Healthco thought significant enough to mention in its responses to the government's interrogatories had little competitive impact in the Metropolitan New York area.

Based upon its analysis of the methodology employed in gathering the government's statistical evidence and the results of the government's survey, the district court stated that the government's methodology was "proper and reliable" and "that the government's statistical exhibits present a reasonably accurate picture of the competition in the two submarkets . . . ." (DC 15, 18). As to the failure of the government's survey to include all mail order houses which may be doing business in Metropolitan New York, the court concluded that "the extent of any deficiency is entirely speculative . . . ." (DC 24). The court then held that "[t]he statistical exhibits for the government . . . are accepted as reasonably accurate for use in measuring the submarkets of sundries and equipment" (DC 26).

The district court's findings concerning the accuracy of the government's statistics and the speculative nature of Healthco's alleged omissions are completely inconsistent with its subsequent conclusion that Healthco's share of the sundries submarket cannot be accurately determined because of the omission of mail order houses which may be making sales in Metropolitan New York. If, as the court found, the extent of any deficiency in the government's survey of the sundries submarket "is entirely speculative" (DC 24),

then there is no evidence in the record to support the conclusion that the government's statistics are inaccurate. In fact, the record clearly indicates that mail order houses cannot effectively compete in Metropolitan New York. The testimony presented at trial establishes that mail order houses are at a competitive disadvantage when they compete directly against dental dealers (T 577; DX M 16). Thus, their sales activities are largely confined to less urbanized areas where competition from dental dealers is less significant (T 236-237). Even assuming that the government's survey did not include all mail order houses which sell dental products within Metropolitan New York, the record indicates that the mail order houses which may have been omitted do not make any significant sales in Metropolitan New York and are not a significant competitive force in the sundries submarket in that area. Therefore, the government's statistics accurately reflect Healthco's share of the sundries submarket as well as the shares of its competitors.

2. The government's statistical evidence was sufficient to establish a prima facie case of illegality in the sundries submarket. The four dealers acquired by Healthco ranked fourth, fifth, sixth and tenth in the sundries submarket at the time of their acquisition by Healthco which was then the seventh ranked dealer (GX 35). As a result of these acquisitions, Healthco's share of the sundries submarket rose from 4.8% to 26.6% in terms of 1968 sales figures and it became the leading dealer in this submarket with sales approximately three times those of the number two ranked dealer (GX 35).

The mergers also significantly increased market concentration in the sundries submarket. Prior to the four acquisitions in question, the top four dealers in the sundries submarket controlled 27.5% of that submarket while the top eight controlled 45.7% and the top ten controlled 52.6%. After the four acquisitions, the top four dealers controlled 45.1%, the top eight 60.6% and the top ten 65.6% (GX 43).

Therefore, the government's statistics proved that Healthco's four acquisitions produced "a firm controlling an undue percentage share of the relevant market, and [resulted] in a significant increase in the concentration of firms in that market . . . ." United States v. Philadelphia National Bank, supra, 373 U.S. at 363. This evidence was sufficient to establish a prima facie case of liability in the sundries submarket under the standards announced in Philadelphia Bank, Pabst and Von's Grocery. See United States v. General Dynamics Corp., supra, 415 U.S. and 496-498. 29/

3. The prima facie case established by the government was not rebutted by Healthco. Rather than establishing that the mergers are not likely to have the anticompetitive effects presumed to occur when a company acquires a large market share through a merger which significantly increases market concentration, the evidence in the record supports the presumption of illegality.

29/ There can be no doubt that sundries are a proper submarket under the criteria established in Brown Shoe. Sundries are physically different from other types of dental products and are recognized by various government agencies and the industry as a separate economic entity.

The district court noted that there were 57 sellers in the sundries submarket and that there may be other mail order houses which would increase this total. However, "even in tightly oligopolistic markets, there may be small firms operating. A fundamental purpose of amending § 7 was to arrest the trend toward concentration, the tendency to monopoly, before the consumer's alternatives disappeared through merger, and that purpose would be ill served if the law stayed its hand until 10, or 20, or 30 more . . ." dental dealers were absorbed. United States v. Philadelphia National Bank, supra, 374 U.S. at 367 (emphasis in original). 30/ Moreover, both the district court's own findings and the record indicate that mail order houses are not a significant competitive force in the oligopolistic market created by Healthco's mergers in Metropolitan New York. Mail order houses have not been able to make significant penetration into this market because they do not generate the good will created by salesmen employed by dental dealers with their customers DX M 16; T 577). 31/ Healthco's speculation that mail order houses will be able to compete more effectively in the future thus reducing the presumed anticompetitive tendencies of this oligopolistic market is not supported by the record. 32/

30/ This is consistent with the view that Section 7 is concerned with "probabilities, not certainties . . . ." Brown Shoe Company v. United States, supra, 370 U.S. at 323.

31/ The fact that mail order houses do not compete to any significant degree with dental dealers is consistent with the fact that many mail order houses purchase significant amounts of their inventories from dental dealers such as Healthco (T 775; DC 8).

32/ Similarly, there is no reason to believe that direct sales by manufacturers will reduce the normal anticompetitive tendencies of an oligopolistic market such as the sundries submarket involved in this case. The evidence in the record supports the district court's conclusion that manufacturers do not compete with dental dealers (T 83, 134).

The district court concluded that entry barriers into the sundries submarket are not as great as the entry barriers into the equipment submarket (DC 35). However, an examination of the record indicates that there are substantial entry barriers into the sundries submarket. Manufacturer's lines of dental products are not easily obtainable (T 94, 172-173, 212-213).[33/] The inability of a potential entrant into the sundries submarket to obtain sundries from a dental products manufacturer is an effective barrier to entry.

Moreover, good will is a significant entry barrier into the sundries submarket. The barriers to entry into a market cannot be evaluated without a complete understanding of the structure and performance of the market in question. See generally J. Bain, Barriers to New Competition: Their Character and Consequences in Manufacturing Industries (1971); R. Caves, American Industry; Structure, Conduct, Performance 22-29 (3rd ed. 1972). One such barrier, which is found in almost all markets, is customer identification with a particular product or service. Ibid. A company, through its business operations, acquires a reputation both within the industry and with its own customers. If the company is successful, customers begin to associate it with desirable characteristics thus creating good will for the company.

An examination of the dental products industry reveals that full line dental dealers employ salesmen who continuously visit their customers in an effort to generate sales (DC 6). These business contacts create a customer-client relationship and good will (T 71, 101, 108). Thus, an established dental dealer has a significant competitive advantage over mail order houses, manufacturers

33/ As noted above, dental products are defined to include both sundries and equipment (DC 4).

and new dental dealers because it has developed and maintained a list of customers with whom it has established a close customer-client relationship and good will (T 577; DXM 16). 34/ A new dental dealer must overcome these established customer relationships through its own salesmen before it can make any significant market penetration. Moreover, a mail order house cannot effectively deal with this problem because the only contact it has with its customers is through a catalogue mailed to the dentist. A catalogue which the dentist may not even choose to read is unlikely to overcome the personal relationshp the dentist has with a salesman for a dental dealer. Therefore, there is a significant entry barrier into the sundries submarket. This entry barrier reduces the possibility that significant new competition will enter the sundries submarket thus reducing the presumed anticompetitive effects of Healthco's acquisitions.

There is no evidence in the record concerning the structure, history and probable future of the dental snndries submarket which indicates that Healthco's four acquisitions will not have an anti-competitive effect. See United States v. General Dynamics Corp., supra. 35/ Rather, the evidence presented at trial strongly suggests that Healthco's acquisition will seriously lessen competition in the sundries submarket because of its dominant market position, the

34/ Moreover, the market for dental products is small in comparison to many other products because the number of new customers entering this submarket each year is comparatively small. Thus, in order to be successful, a new entrant must be able to attract customers away from established dealers.

35/ In General Dynamics, the defendant was able to successfully rebut the government's prima facie case by establishing that because of the unusual market conditions in the coal industry, the merger would not lessen competition in the relevant market. No such showing has been made in this case.

concentrated nature of this submarket, Healthco's established good will in Metropolitan New York and its purchasing power as a national chain, and the inability of mail order houses to effectively compete in urban areas. Therefore, Healthco's four acquisitions violated Section 7 in the sundries submarket.

B. The District Court Erred in Not Reaching the Question of Whether Healthco Violated Section 7 in the Dental Products Market.

The district court stated that there was "no need to consider or make separate findings as to the broad line of commerce of 'dental products'" (DC 36). The failure of the district court to reach the question of whether Healthco's four acquisitions violated Section 7 in the dental products market was particularly prejudicial to the government in view of the district court's subsequent refusal to order complete divestiture. Obviously, a finding that Healthco had violated Section 7 in the dental products market, a market which includes both the equipment and the sundries submarkets, would have required the district court to enter a judgment providing for complete divestiture.

The government's statistical evidence was sufficient to establish a prima facie case of liability in the dental products markets. At the time of their acquisition, the four acquired companies ranked second, sixth, seventh and twelfth in the dental products market while Healthco ranked fifth (GX 32). As a result of its four acquisitions, Healthco's

market share rose from 6.5% to 29.6% in terms of 1968 sales figures and it became the leading company in the market with sales almost four times greater than the number 2 company (ibid.).

Healthco's four acquisitions also significantly increased market concentration. Prior to the mergers, the top four companies controlled 30% of the market, the top eight 51.2% and the top ten 58.8%. After the mergers, the top four controlled 50.4%, the top eight 67.2% and the top ten 72.8% (GX 43). Thus, the government's statistical evidence proved that Healthco acquired "an undue percentage share of the relevant market" and that its acquisitions significantly increased market concentration. United States v. Philadelphia National Bank, supra, 374 U.S. at 363.

The government's prima facie case in the dental products market was not rebutted by Healthco. Rather, the evidence in the record supports the presumption of illegality created by the government's statistical evidence. Since the dental products market includes equipment by definition, the entry barriers into the dental products market are at least as great as the considerable entry barriers noted by the district court in the dental equipment submarket. Moreover, as previously noted, dental dealers face no serious competition in the dental products market from mail order houses because they do not sell equipment and because they cannot effectively compete against dental dealers.36/ Thus, given the fact that Section 7 is concerned with "probabilities, not

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36/ The competitive situation in the equipment and sundries submarkets are discussed on pp. 20-23 and pp. 36-40 of this brief.

certainties" (Brown Shoe Company v. United States, supra, 370 U.S. at 323), the structure and probable future of the dental products market plus Healthco's dominant position in that now oligopolistic market supports the conclusion that Healthco violated Section 7 in the dental products market. 37/

## CONCLUSION

For the reasons stated, the judgment of the district court should be vacated and the case remanded with directions to enter a new judgment providing for complete divestiture of all four acquired companies.

Respectfully submitted.

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37/ Even assuming that Healthco did not violate Section 7 in the sundries submarket, that would not mean that Healthco did not violate Section 7 in the dental products market. The structure of these two lines of commerce is different and they must be considered separately. The entry barriers into the dental products market are higher than the entry barriers into the sundries submarket because dental products includes equipment.

CERTIFICATE OF SERVICE

I, John J. Powers, III, hereby certify that I have on this 24th day of July, 1975, served by mail a copy of the BRIEF FOR THE UNITED STATES OF AMERICA upon the following person:

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